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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 344

MICHIGAN MUTUAL LIABILITY CO. AND PITTSTON STEVEDORING CORP., PETITIONERS

v.

PHILLIP F. ARRIEN, DEPUTY COMMISSIONER, AND ISIDORO PARISI

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT ARRIEN IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1b–15b) is reported at 344 F. 2d 640. The opinion of the district court (App. 29a–44a) [1] is reported at 233 F. Supp. 496.

JURISDICTION

The judgment of the court of appeals was entered on April 5, 1965. Petitioners' timely petition for

[1] "App." references are to the Appendix to Appellants' Brief in the court of appeals. "Supp. App." references are to the Deputy Commissioner's Brief in the court of appeals.

rehearing was denied on April 29, 1965. The petition for a writ of certiorari was filed on July 13, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court and the court of appeals properly affirmed the Deputy Commissioner's determination that an injury sustained by a longshoreman engaged in unloading the cargo of a vessel while upon a platform temporarily extending over navigable waters was "an injury occurring upon the navigable waters of the United States" compensable under the Longshoremen's and Harbor Workers' Compensation Act.

STATUTE INVOLVED

The Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U.S.C. 901, *et seq.*, provides, in pertinent part:

> § 903 [Section 3 of the Act]. *Coverage.*
>
> (a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. * * *
>
> * * * * * *
>
> § 920 [Section 20 of the Act]. *Presumptions.*
>
> In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this chapter.

* * * * *

§ 921 [Section 21 of the Act]. *Review of compensation orders.*

* * * * *

(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order * * *.

* * * * *

STATEMENT

The facts, as stated by the court of appeals (Pet. App. 3b–4b), were found by the Deputy Commissioner (App. 9a–11a) and are undisputed here.

The claimant, Isidoro Parisi, was employed as a longshoreman by the Pittston Stevedoring Corporation. On September 4, 1963, Parisi was engaged in discharging cargo from a vessel when a platform (called a "pallet") upon which cargo was being lowered by ship's equipment broke, causing the cargo to spill. Part of the cargo hit Parisi's leg, throwing him into the water. He was knocked unconscious and was saved from drowning by another longshoreman. Parisi received injuries to his shoulder, head, leg and foot, and, as a result of the accident, he has been temporarily totally disabled (Pet. App. 3b–4b).

When the accident occurred, Parisi was working upon a "skid," a removable rectangular wooden platform, approximately six feet by ten feet, attached between the wharf and the ship on a level some

twenty feet below the ship's deck (Pet. App. 3b). Such skids are used to give longshoremen additional space upon which to work in loading or unloading a vessel. The skid is removed and stored on the wharf when cargo is not being loaded or unloaded (Pet. App. 3b).

When in use, a skid is attached to the wharf by angle irons and, in many instances, by two overhead cables (App. 22a, 23a, 30a). On occasion, however, the cables are attached instead to the ship, so that the skid is supported by the ship (Supp. App. 3a). The skid upon which claimant was hit was fully supported by its attachments to the pier on the day in question. However, a safety net also ran from the skid to the ship's railing, so that the skid was physically attached to the vessel as well (Pet. App. 3b).

Parisi filed a claim for compensation under the Longshoremen's Act. The insurance carrier and the employer conceded that the injury occurred, denied that it was covered by the Act, and asserted that claimant's only remedy was under the New York Workmen's Compensation Act.[3] After finding the basic facts as set forth above, the Deputy Commissioner concluded that the claimant's "injury was sustained upon the navigable waters of the United States" and was thus covered by the Act (App. 9a–

[3] The maximum weekly recovery under the Longshoremen's Act is $70 a week (33 U.S.C. 906(b), 908(b)), with a limit of $24,000 (33 U.S.C. 914(m)), whereas the State statute prescribes a maximum of $55 a week for temporary total disability, not to exceed $6,500. McKinney's Consolidated Laws of New York, Workmen's Compensation Law (1964 Cum. Supp.) § 15.

11a). He entered an award ordering the employer and insurance carrier to pay claimant a lump sum of $630 (the difference between the $70 a week to which claimant was entitled under the Act and the $55 a week which had previously been paid him under the state act) plus $70 a week for the remainder of his temporary total disability (App. 11a–12a).

This action was brought by the insurance carrier and the employer in the district court under Section 21 of the Longshoremen's Act (33 U.S.C. 921, *supra*, p. 3), seeking judicial review of the administrative award on the ground that the injury was not sustained "upon the navigable waters of the United States" within the coverage of the Act. The district court affirmed the Deputy Commissioner's award and the court of appeals (Judge Hays dissenting) affirmed (Pet. App. 1b–15b). The court of appeals noted that, as a temporary device used to bridge the space over navigable waters between ship and wharf during unloading, a skid is similar to a gangplank, injuries on which are clearly covered by the Act.[3] It further noted that the legislative history of the Longshoremen's Act showed a purpose to cover injuries to longshoremen occurring in that area. The court also held that the Deputy Commissioner's award was sustainable under the statutory presumption of coverage (Sec. 20, *supra*, p. 2) as applied by this Court in *Davis* v. *Department of Labor*, 317 U.S. 249, and by the settled doctrine that the Longshoremen's Act should be liberally construed to avoid harsh results.

[3] A skid does not, however, provide a means by which passengers or crew may enter or leave the vessel.

ARGUMENT

The two decisions below upholding the Deputy Commissioner's compensation award are in accord with settled principles under the Longshoremen's Act. There is no conflict of decisions and no occasion for further review.

1. Section 3 of the Longshoremen's Act (33 U.S.C. 903, *supra*, p. 2) makes compensation applicable to injuries "occurring upon the navigable waters of the United States." This legislation was intended "to provide compensation for all injuries sustained by employees on navigable waters whether or not a particular injury might also have been within the constitutional reach of a state workmen's compensation law." *Calbeck* v. *Travelers Insurance Co.*, 370 U.S. 114, 116, 117. With regard to the specific context of this case, the legislative history shows that the Act was intended to provide compensation for injuries to longshoremen engaged "in loading or unloading vessels" in the area "between the wharf and the vessels." S. Rep. 973, 69th Cong., 1st Sess., p. 16. As the courts below held, the injuries here seem clearly within this statutory purpose.[4]

Petitioners contend, however, that the "skid" upon which the accident here occurred should be treated as a part of the wharf itself, not as an area between the wharf and the vessel. The court of appeals re-

[4] While the decisions below did not rely upon it, the fact that the injuries here occurred in part through claimant's actually falling into navigable waters provides an additional basis for upholding the award. *Interlake S.S. Co.* v. *Nielsen*, 338 F. 2d 879 (C.A. 6), certiorari denied, June 1, 1965. No. 1017, O.T., 1964.

jected this characterization, sustaining the administrative finding that since the skid was attached to the wharf only temporarily, during loading or unloading, it was therefore more like a gangplank, injuries on which are deemed not to occur on the wharf but to be clearly within the area of the Act's coverage.[4a] In light of the temporary nature of the skid and its position as a bridge over navigable waters physically connected to the vessel as well as to the wharf, the Deputy Commissioner and the two courts below thus reasonably treated the skid as not constituting a portion of the wharf. In any event, such problems of case-by-case characterization are primarily for the administrator, who awarded compensation here. See *O'Leary* v. *Brown-Pacific-Maxon,* 340 U.S. 504, 508; *O'Keefe* v. *Smith Associates,* 380 U.S. 359, 363–364.[5] They present no issue of general significance warranting review by this Court.

2. An independent basis for affirmance of the administrative award is presented by the statutory presump-

[4a] An injury upon a gangplank over navigable waters is the classic instance of an injury to a longshoreman exclusively within the admiralty jurisdiction. *E.g., Southern Pacific Co.* v. *Jensen,* 244 U.S. 205.

[5] Petitioner contends that the court below erred in relying upon the fact that a skid, like a gangplank but unlike a wharf, occupies space above waters only temporarily, and thus does not withdraw it from navigation, because an injury upon a bridge may occur over waters that are navigable, but not be covered by the Act (Pet. 10–11). An injury upon a bridge, however, is an injury upon something which is permanently an extension of land, and there never was any doubt that state law of its own force could provide compensation for such injuries. Accordingly, there was no occasion for Congress to provide a federal compensation remedy for such injuries.

tion of coverage contained in Section 20(a) of the Act (33 U.S.C. 920(a), supra, pp. 2–3). This Court ruled in *Davis* v. *Department of Labor*, 317 U.S. 249, 256–257, that a case, such as this one, where the injury shows connection with both the land and the navigable waters, falls within the "twilight zone" of overlapping State and federal remedies. In this zone, the statutory presumption requires affirmance of an administrative determination sustaining the employee's election of the federal rather than the state remedy. See also *Moorse's Case*, 323 Mass. 162, 167, 80 N.E. 2d 478, affirmed *sub nom. Bethlehem Steel Co.* v. *Moores*, 335 U.S. 874.[6]

3. Petitioners assert (Pet. 17) that the decision of the court of appeals is in conflict with *Smith & Son* v. *Taylor*, 276 U.S. 179. The issue in that case, which involved events occurring before the enactment of the Longshoremen's Act, was the award of state compensation benefits for a longshoreman struck by cargo while on a "stage that rested solely upon the wharf and projected a few feet over the water" and thrown into the navigable waters where he drowned. The employer conceded that the "stage" and wharf upon which the longshoreman was working were an extension of land.[7] This Court held that

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[6] Accord: *Avondale Marine Ways* v. *Henderson*, 346 U.S. 366; *Interlake S.S. Co.* v. *Nielsen*, 338 F. 2d 879 (C.A. 6), certiorari denied, June 1, 1965, No. 1017, O.T., 1964; *Boston Metals Co.* v. *O'Hearne*, 329 F. 2d 504 (C.A. 4), certiorari denied, 379 U.S. 824; *Holland* v. *Harrison Bros. Dry Dock and Repair Yard, Inc.*, 306 F. 2d 369 (C.A. 5). See also, *Hahn* v. *Ross Island Sand & Gravel Co.*, 358 U.S. 272. Compare *O'Leary* v. *Puget Sound Bridge Co.*, C.A. 9, No. 19273, decided July 29, 1965.

[7] 276 U.S. at 181–182.

the award of state compensation in those circumstances was constitutional, since the injury was not "exclusively within the admiralty jurisdiction." 276 U.S. at 182. Thus there is no conflict with the decisions below here for, while the fact that the skid here was physically supported by the wharf might have been sufficient to sustain the constitutionality of an award of benefits under a state workmen's compensation act, that does not preclude the employee's election of federal Longshoremen's Act benefits. *Calbeck* v. *Travelers Insurance Co., supra,* 370 U.S. at 116–117; *Davis* v. *Department of Labor, supra,* 317 U.S. at 256–258.[8]

4. Judge Hays' dissenting opinion expressed the view that a clear line must be drawn between land

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[8] This Court's decision in *Calbeck* makes it explicit that the Longshoremen's Act applies to injuries upon navigable waters "whether or not a particular injury might also have been within the constitutional reach of a state workmen's compensation law." Petitioners' contention (Pet. 13–14) that the decision in *Calbeck* was intended to eliminate the so-called twilight zone of overlapping compensation remedies and to restore "the federal compensation and state compensation acts to the status of being mutually exclusive rather than overlapping" is directly contrary to that express ruling.

Petitioners also assert (Pet. 12–13) that the decision below is incompatible with the Second Circuit's earlier decisions in *Vega* v. *United States*, 86 F. Supp. 293 (S.D. N.Y.), affirmed, 191 F. 2d 921 (C.A. 2), certiorari denied, 343 U.S. 909; and *Jeffers* v. *Foundation Co.*, 85 F. 2d 24 (C.A. 2). The reasoning of the *Jeffers* decision, however, emphasizes the permanent nature of the structure upon which the injury occurred and thus supports the result below. The *Vega* case involved a fixed platform and a libel for a maritime tort, not a claim for Longshoremen's Act compensation. The unanimous denial of petitioner's petition for rehearing *en banc* in the present case would, in any event, appear to rebut any assertions of an intra-circuit conflict.

and admiralty jurisdiction, and he found that such a line would require the exclusion of injuries upon a "skid" like the one in this case from the coverage of the Act (Pet. App. 11b–14b). As we have shown, however, *supra*, pp. 6–8, and as the majority held, the skid can and should be deemed to be within the admiralty jurisdiction when the employee elects the federal remedy. The premise upon which the dissent is based—that a clear line of demarcation between the admiralty and land jurisdictions must be developed—is incompatible with the legislative purpose recognized in *Davis* v. *Department of Labor*, 317 U.S. 249, to subordinate any desire for a clear line of demarcation to the overriding purpose of providing a speedy, inexpensive and certain remedy for work-connected injuries through affirmance of the employee's reasonable choice of remedies. *Id.* at 254, 256–257.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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